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IN THE

Supreme Court of the United States

October Term, 1994

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., *et al.*,

Cross-Petitioners,

v.

JOINT SCHOOL DISTRICT NO. 241, *et. al.*, and PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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42 U.S.C. § 1983 1,4,5

Pursuant to Rule 15.6 of the Rules of this Court, Citizens Preserving America's Heritage, Inc., *et al.* (Cross-Petitioners) file this Reply to Respondent's Brief in Opposition to address the issue raised in the Brief in Opposition that this case may soon become moot. That issue was not addressed in the Petition or Cross-Petition.

The Harris Child's Graduation Will Not Render This Case Moot

Respondent-Harris suggests, in a footnote to the Brief in Opposition, that because Respondent's youngest child, Samuel Harris, will soon graduate from Grangeville High School, this case may soon become moot. Brief in Opposition at 1 n.1. On the contrary, the graduation of Respondent's child from high school will not moot this case for the following reasons:

(1) This case involves religious expression at a public facility, not in the classroom, and enrollment in school is not necessary for standing.

(2) Harris sued as a taxpayer, and her standing as a taxpayer is unaffected by her child's graduation; and

(3) Harris prevailed on motion for summary judgment in a suit under 42 U.S.C. § 1983 and, if the decision of the Ninth Circuit Court of Appeals is not reversed, Harris is entitled to prospective permanent injunctive as well as monetary relief.

Accordingly, all of the parties have a continuing stake in the outcome of this litigation that will survive the graduation of the Harris child.

1. This Case Involves Religious Expression at a Public Facility, not in the Classroom, and Enrollment in School is not Necessary for Standing.

This case involves prayer and religious expression at a public high school graduation ceremony, not prayer and religious expression in the classroom. The ceremony is open to the public. The relevant standing inquiry in this case is similar to

that in any "public facility" case — whether the plaintiffs use the facility and suffer actual injury.

Directly on point is the recent decision of the Sixth Circuit in *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994), *petition for cert. filed* February 15, 1995 (No. 94-1383). *Washegesic* involved an injunction issued by a district court requiring the removal of a portrait of Jesus Christ that had been hanging in the hallway of a public secondary school. After the injunction was issued, and while the case was on appeal, the plaintiff graduated. 33 F.3d at 681. In rejecting the defendant-school district's claim that the case was moot, the Court of Appeals for the Sixth Circuit held that the plaintiff's status as a student was not necessary to confer standing in the case. 33F.3d at 381-83. The court reasoned that the student might still visit the school after graduation to attend sporting events and other functions at the school. 33 F.3d at 682. Therefore, the student risked confronting the portrait whenever he passed through the hall.

Also directly on point is *Collins v. Chandler Unified School District*, 470 F. Supp. 959, *aff'd in part, rev'd in part*, 644 F. 2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981), a case relied upon by the Ninth Circuit panel majority in this case. *Collins* involved a suit by a parent on her own behalf to enjoin a school district's practice of allowing students to include prayers at public assemblies. The district court held that the parent had standing because the parent was a resident within the boundaries of the school district. 470 F. Supp. at 960-61 & n.1. Numerous cases are in accord with *Collins* and *Washegesic*.[1]

[1] See, e.g., *Jager v. Douglas County School District*, 862 F.2d 824, 826 n.1 (11th Cir.), *cert. denied*, 490 U.S. 1090 (1989) (graduated student and father challenging prayer at high school football games permitted to "continue this suit . . . as people who attend football games); *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1398-99 (10th Cir. 1985) (parents who relocated from school district continued to have standing to raise establishment clause challenge to religious meetings held on school premises during school hours and distribution of Bibles at school because parents continued to pay taxes in the school district); *ACLU v. Rabun County*, 698 F.2d 1098, 1108 (11th Cir. 1983) (Plaintiffs had standing to challenge

The rule articulated in *Washegesic* and *Collins* is applicable here. Harris and her children may, in the future, attend graduation ceremonies at Joint School District No. 241 schools, and risk exposure to prayer and religious expression at graduation ceremonies. Accordingly, Harris and her children continue to have standing to assert their Section 1983 claim after the children's graduation from the school.

Moreover, a ruling that this case is now moot would be inconsistent with the Fifth Circuit's decision and this Court's order in *Jones v. Clear Creek Independent School District (Jones II)*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), the Fifth Circuit's graduation prayer decision which is in conflict with the Ninth Circuit's decision below. In *Jones II*, students and parents sued to enjoin student-initiated graduation prayer. The case continued long after the graduation of the student-plaintiffs in *Jones v. Clear Creek Independent School District (Jones I)*, 930 F.2d 416 (5th Cir. 1991), *vacated and remanded*, 112 S. Ct. 3020 (1992) (vacating judgment and remanding for further consideration in light of *Lee v. Weisman*). But neither the Fifth Circuit in *Jones I* or *Jones II*, nor this Court, in remanding the case, suggested that the case was moot.

2. Harris Continues to Have Standing to Bring this Suit in her Capacity as a District Taxpayer.

Harris, in her initial complaint, sued not only on behalf of her children, but also "on her own behalf as a taxpayer to [the School] District," *see* Harris's Complaint at ¶ 2, and averred to be a taxpayer to Joint School District No. 241. *Id.* at ¶ 5. Harris

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cross displayed in Georgia state park because plaintiffs' use of park was "conditioned upon the acceptance of unwanted religious symbolism"); *Murray v. Austin*, 947 F.2d 147, 151 (5th Cir. 1991) *cert. denied*, 112 S. Ct. 3028 (1992) (citizen had standing based upon "exposure" to city insignia which contained cross); *Harvey v. Cobb County*, 811 F. Supp. 669, 674 (N. D. Ga. 1993), *aff'd*, 15 F.3d 1097 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2138 (1994) (lawyer had standing to challenge Ten Commandments posted in courthouse); *Donnelly v. Lynch*, 691 F.2d 1029 (1st Cir. 1982) (municipal taxpayer had standing to challenge city's erection and display of nativity scene), *rev'd on other grounds*, 465 U.S. 668 (1984).

had taxpayer standing at the outset of this litigation and continues to have standing on that basis.

Harris sued under 42 U.S.C. § 1983 alleging that her rights under the Establishment Clause were violated by the school district's policy of allowing students to include prayer and religious expression in graduation ceremonies. At every stage of this litigation, Harris has claimed an economic injury by virtue of her taxpayer status:

> As the Court below noted, the public school underwrites these commencement programs with taxpayer funds, providing "the building, chairs, platform for speakers, sound system, secretarial help, and janitorial staff," and also defrays the cost of the written program in which prayers and hymns are listed. Children are allowed, by simple majority vote, to transform a government program into a religious service . . . paid for by government funds.

Respondent's Brief in Opposition at 2 (citing *Harris v. Joint School District No. 241*, WL651111 (No. 93-35839) (9th Cir., November 18, 1994). Appendix B to the Petition at B-21, B-19.

Moreover, a finding that Harris has taxpayer standing would be consistent with this Court's decision in *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Although the *Lee* Court did not find it necessary to rule upon the standing of Daniel Weisman (a taxpayer-plaintiff) to challenge the graduation prayer in that case, the language employed by this Court indicated that the constitutional wrong in *Lee* reached not only Deborah Weisman (a student) but also her parents:

> The school board (and the United States, which supports it as amicus curiae) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students *and parents* throughout this country who consider that due respect and acknowledgement for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life

> as a graduation. We assume this to be so in addressing the difficult case now us, for the significance of the prayers lies also at the heart of *Daniel and Deborah Weisman's* case.
>
> . . . .
>
> . . . Assuming, as we must, that the prayers were offensive to the students *and the parents* who now object, the intrusion was both real and, in the context of a secondary school, a violation of the *objectors'* rights. That the intrusion was in the course of promulgating religion that sought to be civic and nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the *objectors*. . . .
>
> . . . .
>
> . . . [The government's position] fails to acknowledge that what for many of Deborah's classmates *and their parents* was a spiritual imperative was for *Daniel and Deborah Weisman* religious conformance compelled by the State. . . .

Id. at 2653, 2659, 2660 (emphasis added).

Therefore, since the outset of this litigation, Harris had standing as a taxpayer to litigate this Establishment Clause claim and continues to have standing on that basis.

3. Under the Ninth Circuit's Decision, Harris's Rights to Injunctive and Monetary Relief are not Affected by her Child's Graduation.

Harris sued under 42 U.S.C. § 1983 and, on a motion for summary judgment, prevailed on appeal to the Ninth Circuit. In that motion, Harris demanded permanent injunctive relief not limited in duration to the period of time one or more of her children remained in school. While this matter was pending before the district court, Harris similarly sought an injunction not limited in time. *See* Harris's Application for Preliminary Injunction. To enforce the Ninth Circuit's decision, Harris will do what she has done before — seek an order from the district

court permanently enjoining the school district from allowing students to pray or express their faith during high school graduation ceremonies — an order that is neither limited in duration nor dependent upon whether the Harris child remains in public school. The injunction that Harris seeks would survive the Harris child's graduation.

Moreover, Harris's motion for preliminary injunctive relief was denied by the district court, and Beverly Harris attended a graduation ceremony where student-initiated graduation prayer and religious expression were included. *See* Respondent's Brief in Opposition at 1-2. Therefore, Harris has a present claim for damages under Section 1983 and may seek to recover those damages from the school district.[2]

In view of the prospect of an injunction granting permanent relief to Harris and restraining the school district, and the potential for compensatory and other damages, the parties have a continuing stake in this litigation.

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[2] Harris's complaint included a demand for preliminary and permanent injunctive relief but did not explicitly list compensatory damages in the relief requested. *See* Complaint at ¶ 11, *Harris v. Joint School District No. 241*, 821 F. Supp. 638 (D. Idaho 1994) (No. 91-0166-N-HLR). The complaint also included a demand for "additional and alternative relief as is just in the circumstances." In Harris's application for preliminary injunction, Harris alleged that money damages would not be adequate to compensate Respondent for the threatened violation of her and her children's rights. *See* Application for Preliminary Injunction at ¶ (5), *Harris*, 821 F. Supp 638. Harris never waived or disclaimed her right to receive monetary damages. Accordingly, compensatory damages are fairly included in the "alternative relief" demanded in the complaint and not precluded by the Ninth Circuit's ruling.

Conclusion

The graduation of Samuel Harris will not render this case moot and, for the reasons set forth in the Petition and Cross-Petition for writ of certiorari, the writ should be granted.

Respectfully submitted,

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